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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 30
CIVIL

MONTGOMERY WARD & COMPANY, PETITIONER

vs.

LUTHER M. DUNCAN, RESPONDENT

ON CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
EIGHTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENT

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FOUNDATION PRESS, INCORPORATED, LITTLE ROCK, ARK.

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The judgment in this cause rendered by the United States Circuit Court of Appeals for the Eighth Circuit should be affirmed for the reasons: 1. that it is in conformity with the statutes and decisions of Arkansas; 2. that it is in conformity with the decisions of other state

courts; 3. that it is in conformity with the federal statutes and decisions; 4. that it is in conformity with the plain import of the rule itself; 5. that the contingency under which petitioner sought a new trial never happened; 6. that petitioner abandoned any rights it might have had under its motion; 7. and that the question presented in this review is now moot insofar as it affects this case.

1. *The judgment in this cause was in conformity with the statutes and decisions of Arkansas.*

It is doubtful if the state statutes and decisions are now of any importance in construing the rule in question; but, at least, if they are, they support the contention of respondent.

There is no provision in Arkansas allowing the filing of a motion for a new trial with motion for judgment notwithstanding the verdict, the latter motion depending upon facts alleged in the pleadings, and it being necessary to file the motion after verdict but before the entry of judgment. Section 8229, *Pope's Digest; Oil Fields Corporation v. Cubage*, 180 Ark. 1018, 24 S. W. (2d) 564. Hence no strict comparison can be made. But it has long been the rule in Arkansas that, where only a point of law is involved, the appellate court may order the proper judgment entered without regard to the decision reached in the trial court. Section 2786, *Pope's Digest; Hope Spoke Co. v. Maryland Casualty Co.*, 102 Ark. 1, 143 S. W. 85.

Section 2786 of Pope's Digest of the Statutes of Arkansas, *supra*, contains the following provision:

> "Power to reverse, affirm or modify. The Supreme Court may reverse, affirm or modify the judgment or order appealed from, in whole or in part, and as to any or all parties, and when the judgment or order has been reversed, or affirmed, the Supreme Court may remand or dismiss the cause and enter such judgment upon the record as it may in its discretion deem just."

In the case of *Hope Spoke Co. v. Maryland Casualty Co.*, 102 Ark. 1, 143 S. W. 85, in which the trial court directed the jury to return a verdict in favor of defendant,

the Supreme Court of Arkansas had under consideration the procedure governed by the foregoing statute, and there said:

> "Judgment under the undisputed facts should have been in favor of appellant. The cause will be remanded to the circuit court with directions to enter judgment in appellant's favor for the amount of the liability mentioned in the stipulation."

2. *The judgment in this cause was in conformity with the decisions of other state courts.*

In the case of *Spruce v. Chicago, Rock Island & Pacific Railway Co.*, 281 Pac. 586, 139 Okla. 123, the trial court granted both a motion for judgment notwithstanding the verdict and for a new trial. On appeal, the action was reversed, the appellate court saying:

> "It seems to be everywhere recognized that, where a motion for a new trial is pending before the court, and also where a motion for judgment notwithstanding the verdict is pending at the same time, the movant in the motions is entitled only to alternative relief; that is, both motions cannot be sustained, notwithstanding that the facts in the case may clearly entitle him to the relief asked for in either motion. This seems to be the accepted law. At least the rule is recognized and sanctioned by practically all, if not all, of the authorities. *Luse v. Union Pacific Railway Co.*, 57 Kan. 361, 46 Pac. 768; *Farmers Savings Bank v. Burr Forbes & Son*, 151 Iowa 627, 132 N. W. 59; *Olson v. Minn. & N. W. Ry. Co., 89 Minn.* 289, 94 N. W. 871; *Jones v. Chicago, St. P., M. & O. Ry. Co.* 80 Minn. 488, 83 N. W. 446, 49 L. R. A. 640; *Kommerstad v. Great Northern Ry. Co.*, 125 Minn. 297, 146 N. W. 975; *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357; and *Harker v. Smith*, Ex'r, 5 Ohio Dec. (Reprint) 560 * * * *."

3. *The judgment in this cause was in conformity with the federal statutes and with the spirit and trend of the weight of the decisions of other circuits, and of this court.*

Section 269 of the Judicial Code (28 U. S. C. A. 391), as amended by the Act of February 26, 1919, reads as follows:

> "All United States Courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

Under the foregoing statute, the holdings of the courts seem to be to the effect that, on appeal, judgment will be rendered on the whole record, without regard to errors that do not affect the substantial rights of the parties. *Rich v. United States*, 271 Fed. 566; *Haywood v. United States*, 268 Fed. 795; *Trope v. United States*, 276 Fed. 348; *Furlong v. United States*, 10 Fed. (2d) 492.

The two decisions relied on by petitioner most confidently are those in the cases of *Pruitt v. Hardware Dealers Mut. Fire Ins. Co.*, 112 Fed. (2d) 140, (C. C. A. 5), and *Pessagno v. Euclid Investment Co.*, 112 Fed. (2d) 577 (C. A., D. C.).

There would be no disputing the fact that the conclusion reached in the above cases is in conflict with that reached by the Circuit Court of Appeals in the case at bar if the question urged in this case by petitioner were the question reflected by the record and decided by the Circuit Court of Appeals; but that is not the situation. Petitioner, in its brief in support of its petition for certiorari, stated the question presented in the following form: (P. 19).

"The Circuit Court of Appeals erred in holding that the order of the District Court sustaining the motion for a judgment notwithstanding the verdict was equivalent to a denial of the motion for a new trial, and that the latter motion passed out of the case upon the entry of the order."

In the present brief the foregoing specification is repeated and there is added an additional specification that "the Circuit Court of Appeals erred in remanding the case with direction to reinstate the verdict of the jury and the judgment entered thereon." It is possible that this additional specification may be considered as merely incidental to the original. However, the points argued vary rather materially from the question presented in the petition.

But, in any event, the foregoing statement of the issue involved entirely omits the issues of abandonment by petitioner of its motion for a new trial, of the peculiar wording of the prayer of the petitioner and the fact that the contingency under which a new trial was sought never accrued, and of the fact that all questions of merit have been settled adversely to the contentions of petitioner and have not been preserved for review here, and that, therefore, the question sought to be presented has become moot, insofar, at least, as it might affect the result in this case, all of which issues are involved in the case at bar.

In the Pessagno case, moreover, in addition to the situation that the facts were clearly and substantially different from the facts in the case at bar, it is apparent that the Court of Appeals was induced to reach the conclusion there reached by the fact that this Court had directed the issuance of the writ of certiorari in this case. The Pessagno case, therefore, lends little weight to the position of petitioner. As to the Pruitt case, the conflict would have been irreconcilable, if the facts and issues had been the same. In neither the Pruitt nor the Pessagno case was there any question of abandonment of the motion for a new trial, or of the failure of the happening of the contingency under which a new trial was sought, or of the

failure of petitioner to preserve any question on the merits of the case.

The exact question presented by the record in this case could probably be more fully and accurately stated as follows:

> Where a motion for a directed verdict is renewed within the ten-day period allowed by Rule 50 (b) of the Federal Rules of Civil Procedure, and there is joined with the renewed motion a conditional motion for a new trial, sought only in the event the renewed motion for directed verdict is denied, and the renewed motion is granted, and movant resists any action by the trial court on the motion for a new trial, but insists that such motion passes out of the case on the granting of the renewed motion for directed verdict, does it constitute error on the part of the appellate court to hold that (R. 135) "The order sustaining the motion for judgment notwithstanding the verdict was equivalent to a denial of the motion for a new trial; and the latter motion passed out of the case on the entry of the order?" In other words, does it constitute reviewable error on the part of the appellate court to agree with the contention made by the complaining party in the trial court? And, moreover, where all questions on the merits of the case have been settled adversely to the contentions of petitioner, and no complaint is made or question preserved as to those decisions, is petitioner entitled to have its case reviewed on certiorari? In other words, has not the question presented become moot?

The decision in the case at bar was, of course, on the peculiar facts and proceedings reflected by the record; and, as stated, those facts and proceedings differed from the facts and proceedings in the Pruitt and Pessagno cases.

It it believed, however, that the decisions in the Pruitt and Pessagno cases, *supra*, even on the facts involved in those cases, are not in accord with the spirit and trend of the applicable decisions of other circuits indicating the fluctuations and conflicts in opinion, and the general trend toward what is believed by respondent now to be the correct rule.

One of these cases is that of *Clemence v. Hudson & M. Ry. Co.*, 11 Fed. (2d) 913 (C. C. A. 2). In this case, "the defendant had moved for a nonsuit before verdict, which the court denied," and the jury returned a verdict in favor of plaintiff. Thereafter, but within apt time, "the court set aside the verdict, directed a verdict for the defendant, and entered judgment upon it, dismissing the complaint on its merits." Plaintiff sued out a writ of error and took the cause to the Circuit Court of Appeals. That court said:

> "The trial court set aside the verdict, and then directed a verdict of his own, upon which he entered judgment. These last two acts he had no power to do. Slocum v. New York Life Ins. Co."

In the above case, there was no reservation on the decision of the question raised by defendant's motion. There was, nevertheless a strong dissenting opinion by Judge Manton, who reached the conclusion that "the order setting aside the verdict and judgment should be reversed, and the judgment allowed to stand as entered."

Another is the case of *Skelley v. N. Y., N. H. & H. R. Co.*, 93 F. (2d) 479 (C. C. A. 2). In this case, a motion was made by defendant at the close of all the evidence for a directed verdict in its favor. The motion was denied, the cause was submitted to the jury, and a verdict was returned for plaintiff. The trial court, however, reserved the question of his final decision on the motion; and, thereafter, he entered a verdict for the defendant dismissing the complaint. Plaintiff appealed. The Circuit Court of Appeals said:

> "Appellant asks to reinstate the verdict. The trial judge, after the rendition of the verdict, when appellee moved to set it aside because it was against the law and evidence, denied the motion 'because it was clearly a jury question.' Our examination of the record reveals no errors in the court's ruling as to the admission or exclusion of evidence. The one exception to the charge of the court is general and addressed to the jury. The merits of this exception we have just considered. No other argument

has been presented by appellee in its brief. Where there are no errors of law prejudicial to appellee, the established practice of reinstating the verdict should be followed. Hoffman v. American Mills Co., 288 F. 768 (C. C. A. 2). The New York Practice Act, Section 461, provides for the reservation of motions for the direction of a verdict for either party until after the jury's verdict after which the verdict may be set aside and the complaint dismissed. See Baltimore & Carolina Line v. Redman, 295 U. S. 654, 55 S. Ct. 890, 79 L. ed. 1636. The New York practice usually permits, where no prejudicial error is shown, a remanding of the case for reinstatement of the verdict and the entry of judgment thereon. See Niemoller v. Duncombe, 59 App. Div. 614, 69 N. Y. S. 88, affirmed 172 N. Y. 621, 65 N. E. 1120; Herman v. P. H. Fitzgibbons Boiler Co., 136 App. Div. 286, 120 N. Y. S. 1074; Doratio v. Jackson, 174 App. Div. 88, 160 N. Y. S. 266; Gartner v. Goodman, 201 App. Div. 177, 194 N. Y. S. 258; Northeastern Paper Co. v. Concord Paper Co., 214 App. Div. 537, 212 N. Y. S. 318, affirmed 242 N. Y. 562, 152 N. E. 428. The Massachusetts rule of practice is the same. Doonan v. Gravina, 291 Mass. 103, 195 N. 895; Kaminski v. Fournier, 235 Mass. 51, 55, 126 N. E. 279; Lincoln v. New York, N. H. & H. R. Co., 291 Mass. 116, 196 N. E. 151. See, also, Shives v. Eno Cotton Mills, 151 N. C. 290, 66 S. E. 141; Szabo v. Feiler, 239 Mich. 380, 214 N. W. 128.

"If the appellee is so advised, it will be heard as to any alleged error it considers presented by the record, by filing a brief within ten days from the rendition of this opinion; otherwise the verdict will be reinstated.

"Judgment reversed."

Another case is that of *Pettingill v. Fuller*, 107 F. (2d) 933 (C. C. A. 2). A first trial in this cause resulted in a verdict for defendant. "On motion of the plaintiff, the judge set aside the verdict rendered at the first trial." On a second trial, there was a verdict in favor of plaintiff, on which judgment was entered. Defendant appealed. The

Circuit Court of Appeals said: (p. 934).

"It is quite plain that there was no ground for setting aside the verdict rendered at the first trial * * *.

"In spite of the fact that the courts of the United States have been most loath to review orders granting or denying motions to set aside verdicts, it is implicit in the opinion of Justice Brandeis in Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 483-486, 53 S. Ct. 252, 77 L. Ed. 439. There a review was declined because there was no explanation by the trial judge of his refusal to set the verdict aside and the record did not show that the verdict was clearly erroneous and arbitrary. The question whether an order granting or denying a motion for a new trial may be reviewed on appeal when not followed by a final judgment entered after a new trial is not involved in the case at bar. Here we are reviewing an interlocutory order after final judgment in the action. An attempt to review an order setting aside a verdict has rarely been made under such circumstances; indeed never within our knowledge. That such an order may be reviewed on an appeal from a final judgment is undoubted unless the exercise of judicial discretion involved in making it is beyond the correcting hand of a court of appeal, no matter how arbitrary it was. We think that Justice Brandeis in Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 485, 53 S. Ct. 252, 77 L. Ed. 439. evidently regarded such orders as reviewable. Indeed, the dissenting Justices (Stone and Cardozo. JJ.) held that the court of appeals properly reviewed and reversed an order granting a new trial where the trial court had abused its discretion in refusing to set aside a verdict for nominal damages rendered by a jury in plain disregard of the evidence.

"The refusal to review the denial of a motion for a new trial on newly discovered evidence may stand on a different footing. Here the error of the trial court was in the course of one trial. It was not in declining to open the record where no fraud was shown and the case so far as the trial court was concerned had come to an end.

"The judgment for the plaintiff on the second trial

is reversed with costs, the order setting aside the verdict for the defendant is reversed, the verdict for the defendant is ordered reinstated and final judgment thereon shall be entered for the defendant."

A still further case is that of *Leader v. Apex Hosiery Co.*, 108 F. (2d) 71 (C. C. A. 3). In a suit by Apex Hosiery Company against William Leader et al, there was a verdict for plaintiff on which judgment was entered. The defendants "filed motions to set aside the verdict and judgment and moved for a new trial. These motions were denied by the trial judge." Defendants appealed. The Circuit Court of Appeals held:

> "The judgment of the court below is reversed and the cause is remanded with directions to enter judgment in favor of appellants in accordance with Rule 50 (b) of the Federal Rules of Civil Procedure."

In the case of *Reliance Life Insurance Company v. Burgess*, 112 F. (2d) 234 (C. C. A. 8) the plaintiff, an insurer, had moved for a directed verdict, which motion the trial court overruled. Thereafter, and within proper time, "plaintiff served on the defendants a motion for judgment notwithstanding the verdict and for a new trial in accordance with Rule 50 (b), * * *" which motions the trial court overruled, and the plaintiff appealed. The Circuit Court of Appeals, in commenting on the issue, said:

> "Plaintiff made a motion for judgment notwithstanding the verdict, which was denied. It follows that the judgment appealed from should be reversed and the cause remanded with directions to enter judgment for the plaintiff. Rule 50, Rules of Civil Procedure; Massachusetts Protective Association v. Mouber, 8 Cir., 110 F. (2d) 203; Lowden v. Denton, 8 Cir., 110 F. (2d) 274. It is so ordered."

In the case of *Ferro Concrete Construction Company v. United States*, 112 F. (2d) 488 (C. C. A. 1), one of the defendants filed motions for a directed verdict which the court overruled. The moving defendant, after an adverse verdict and judgment, perfected an appeal. The Circuit

Court of Appeals, in passing on the issues of the case here involved, said:

> "The case having been tried after the Federal Rules of Civil Procedure had gone into effect, the denial of the defendant's motion for a directed verdict was equivalent to a submission of the action of the jury 'subject to a later determination of the legal questions raised by the motion.' Rule 50, 28 U. S. C. A. following Section 723 c. The defendant having moved seasonably that the verdict and judgment thereon be set aside and to have judgment entered in accordance with its motion for directed verdict, there is no occasion for a new trial of the issues involved in plaintiff's claim. The verdict for the plaintiff should be set aside, the judgment vacated, and judgment for the defendant entered."

Several cases of this court likewise demonstrate the trend in the decisions on this question, and shed light on the purpose of the rule in question. One of the early cases is that of *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 57 L. ed. 879, in which the facts and proceedings were:

> "At the conclusion of all the evidence, the defendant requested the court to direct a verdict in its favor, which the court declined to do, and the company excepted." There was a directed verdict for the plaintiff. "The company moved for judgment in its favor on the evidence, notwithstanding the verdict, but the motion was denied, the company excepting, and judgment was entered for the plaintiff." The company took the case to the circuit court of appeals. "That court reversed the judgment, with a direction to sustain the latter motion * * *." The plaintiff prayed and was granted a writ of certiorari by the Supreme Court of the United States, where upon the trial of the cause, the judgment of the circuit court of appeals was modified "by eliminating the direction to enter judgment for the defendant notwithstanding the verdict, and by substituting a direction for a new trial."

There was no reservation in the above case of the decisions on the questions raised by defendant's motions. However, there was a strong dissenting opinion in this

case by Mr. Justice Hughes, who, being joined by Justices Holmes, Lurton and Pitney, reached the conclusion that the case should be remanded with directions to sustain the motion for judgment notwithstanding the verdict rather than to grant a new trial.

Another leading case on this point is that of *Baltimore & C. Line v. Redman*, 295 U. S. 654, 79 L. Ed. 1636, the opinion in which is as follows:

> "This was an action in a federal court in New York to recover damages for personal injuries allegedly sustained by the plaintiff through the defendant's negligence. The issues were tried before the court and a jury. At the conclusion of the evidence the defendant moved for a dismissal of the complaint because the evidence was insufficient to support a verdict for the plaintiff, and also moved for a directed verdict in its favor on the same ground. The court reserved its decision on both motions, submitted the case to the jury subject to its opinion on the questions reserved, and received from the jury a verdict for the plaintiff. No objection was made to the reservation or this mode of proceeding. Thereafter the court held the evidence sufficient and the motions ill-grounded, and accordingly entered a judgment for the plaintiff on the verdict.
>
> "The defendant appealed to the Circuit Court of Appeals, which held the evidence insufficient and reversed the judgment with a direction for a new trial. The defendant urged that the direction be for a dismissal of the complaint. But the court of appeals ruled that under our decision in Slocum v. New York L. Ins. Co. the direction must be for a new trial. We granted a petition by the defendant for certiorari because of the last ruling and at the same time denied a petition by the plaintiff challenging the ruling on the insufficiency of the evidence.
>
> "The Seventh Amendment to the Constitution prescribes:
>
> " 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury

shall be otherwise re-examined in any court of the United States, then according to the rules of the common law.'

"The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted. The Amendment not only preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of re-examination existing under the common law, and to that end declares that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.'

"The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.

"In Slocum v. New York L. Ins. Co., a jury trial in a federal court resulted in a general verdict for the plaintiff over the defendant's request that a verdict for it be directed. Judgment was entered on the verdict for the plaintiff and the defendant obtained a review in the court of appeals. That court examined the evidence, concluded that it was insufficient to support the verdict, and on that basis reversed the judgment given to the plaintiff on the verdict, and directed that judgment be entered for the defendant. A writ of certiorari then brought the case here. The question presented to us was whether, in the situation disclosed, the direction for a judgment for the defendant was an infraction of the Seventh Amendment. We held it was and that the direction should be for a new trial.

"It therefore is important to have in mind the situation to which our ruling applied. In that case the defendant's request for a directed verdict was denied

without any reservation of the question of the sufficiency of the evidence or of any other matter; and the verdict for the plaintiff was taken unconditionally, and not subject to the court's opinion on the sufficiency of the evidence. A statute of the State wherein the case was tried made provisions for reserving questions of law arising on a request for a directed verdict, but no reservation was made. The same statute also provided that where a request for a directed verdict was denied the party making the request could have the evidence made part of the record and that, where this was done, the trial court, as also the appellate court, should be under a duty 'to enter such judgment as shall be warranted by the evidence.' It was in conformity with this part of the statute that the court of appeals directed a judgment for the defendant.

"We recognized that the state statute was applicable to trials in the federal courts in so far as its application would not effect an infraction of the Seventh Amendment, but held that there had been an infraction in that case in that under the pertinent rules of the common law the court of appeals could set aside the verdict for error of law, such as the trial court's ruling respecting the sufficiency of the evidence, and direct a judgment for the defendant, for this would cut off the plaintiff's unwaived right to have the issues of fact determined by a jury.

"A very different situation is disclosed in the present case. The trial court expressly reserved its ruling on the defendant's motion to dismiss and for a directed verdict, both of which were based on the asserted insufficiency of the evidence to support a verdict for the plaintiff. Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court. The verdict for the plaintiff was taken pending the court's rulings on the motions and subject to those rulings. No objection was made to the reservation or this mode of proceeding, and they must be regarded as having the tacit consent of the parties. After the verdict was given the court considered the motions pursuant to the reservation, held the evidence sufficient, and denied the motions.

"The court of appeals held that the evidence was insufficient to support the verdict for the plaintiff; that the defendant's motion for a directed verdict was accordingly well taken; and therefore that the judgment for the plaintiff should be reversed. Thus far we think its decision was right. The remaining question relates to the direction which properly should be included in the judgment of reversal.

"At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments.

"Fragmentary references to the origin and basis of the practice indicate that it came to be supported on the theory that it gave better opportunity for considered rulings, made new trials less frequent, and commanded such general approval that parties litigant assented to its application as a matter of course. But whatever may have been its origin or theoretical basis, it undoubtedly was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that Amendment.

"This Court has distinctly recognized that a federal court may take a verdict subject to the opinion of the court on a question of law, and in one case where a verdict for the plaintiff was thus taken has reversed the judgment given on the verdict and directed a judgment for the defendant.

"Some of the States have statutes embodying the chief features of the common-law practice which we have described. The State of New York, in which the trial was had, has such a statute; and the trial court,

in reserving its decision on the motions which presented the question of the sufficiency of the evidence, and in taking the verdict of the jury subject to its opinion on that question, conformed to that statute and the practice under it as approved by the Court of Appeals of the State.

"In view of the common-law practice and the related state statute, we reach the conclusion that the judgment of reversal for the error in denying the motions should embody a direction for a judgment of dismissal on the merits, and not for a new trial. Such a judgment of dismissal will be the equivalent of a judgment for the defendant on a verdict directed in its favor.

"The court of appeals regarded the decision in Slocum v. New York L. Ins. Co., 228 U. S. 364, 57 L. ed. 879, 33 S. Ct. 523, Ann. Cas. 1914D, 1029, as requiring that the direction be for a new trial. We already have pointed out the differences between that case and this. But it is true that some parts of the opinion in that case give color to the interpretation put on it by the court of appeals. In this they go beyond the case then under consideration and are not controlling. Not only so, but they must be regarded as qualified by what is said in this opinion.

"It results that the judgment of the court of appeals should be modified by substituting a direction for a judgment of dismissal on the merits in place of the direction for a new trial, and, as so modified, should be affirmed.

"Judgment modified and affirmed as modified."

Another case is that of *Aetna Insurance Co. v. Kennedy*, 301 U. S. 389, 81 L. ed. 1177. This was a suit on fire insurance policies. At the close of all the evidence, both parties requested instructed verdicts and other instructions on the issues involved. "The court refused to direct for plaintiff or defendants, and, without reserving for later consideration the requests for directed verdicts or any question of law, submitted the cases to the jury. It found for defendants. Plaintiff filed motions for new

trials but did not move for judgments non obstante veredicto. The court denied the motions and entered judgments for defendants. Plaintiff appealed. The Circuit Court of Appeals * * * reversed the judgments of the district court and ordered new trials." On rehearing, however, the opinion was modified so as to direct judgments for plaintiff on remand. Defendants took the case to the Supreme Court on certiorari. That court held:

> "The Circuit Court of Appeals erred in holding that, by their requests for peremptory instructions, the parties took the cases from the jury and applied to the judge for decision of the issues of fact as well as of law. The established rule is that where plaintiff and defendant respectively request peremptory instructions, and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences properly to be drawn from them. And upon review a finding of fact by the trial court such circumstances must stand if the record discloses substantial evidence to support it. But, as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver. And unquestionably the parties respectively may request a peremptory instruction and, upon refusal of the court to direct a verdict, have submitted to the jury all issues as to which opposing inference may be drawn from the evidence. Here neither the plaintiff nor the defendants applied for directed verdicts without more. With their requests for peremptory instructions they submitted other requests that reasonably may be held to amount to applications that, if a peremptory instruction is not given, the cases be submitted to the jury. Indeed, we find nothing in the record to support the view that the parties waived their right of trial by jury or authorized the judge to decide any issue of fact.
>
> "The verdicts were taken unconditionally. Plaintiff moved for new trials but not for judgments. The court denied her motions and entered judgments for defendants. The Circuit Court of Appeals had jurisdiction to reverse and remand for new trials but was without power, consistently with the Seventh Amendment, to direct the trial court to give judgments for

plaintiff. And, as before submission of the case to the jury the trial court denied plaintiff's motion for directed verdicts without reserving any question of law, neither that court nor the Circuit Court of Appeals had jurisdiction to find or adjudge that notwithstanding the verdicts plaintiff was entitled to recover. Slocum v. New York L. Ins. Co., 228 U. S. 364, 387, 57 L. ed. 879, 889, 33 S. Ct. 523, Ann. Cas. 1914D, 1029. Our decision in Baltimore & C. Line v. Redman, 295 U. S. 654, 79 L. ed. 1636, 55 S. Ct. 890, is not applicable.

"There is another reason why the direction of judgments for plaintiff cannot stand. Under the Conformity Act, 28 U. S. C. A., Section 724, federal courts follow the practice authorized by state statute, if there be nothing in them that is incongruous with their organization or their fundamental procedure or in conflict with congressional enactment. The applicable Pennsylvania statute provides that whenever, upon the trial of any cause, a point requesting binding instructions has been reserved or declined, the party presenting the point may move the court for judgment non obstante veredicto; whereupon it shall be the duty of the court, if it does not grant a new trial, to enter such judgment as should have been entered upon the evidence. From the judgment thus entered either party may appeal to the supreme or superior court which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court. As plaintiff failed to make appropriate motions in accordance with Pennsylvania practice, the district court did not err in failing to give plaintiff judgments notwithstanding the verdicts. The Conformity Act does not extend to the Circuit Court of Appeals. In the absence of motions for judgments notwithstanding the verdict in the lower court, the appellate court was without authority to direct entry of judgments for plaintiff."

In the light of these statutes and decisions and of the note appended to the rule by the Committee, it seems clear that the purpose of the rule involved was to enable the appellate court to settle all issues, under situations like this, and to end litigation as expeditiously as possible.

Reference is made in the annotations to the rule to the practice in Massachusetts, which is set forth in the case of *Northern Ry. Co. v. Page*, 274 U. S. 65, 71 L. ed. 929, pertinent portions of the opinion being:

> "At the close of the evidence, the district judge, doubting whether there was anything to show negligence on the part of the defendant, submitted the case to the jury; and, in accordance with the practice in Massachusetts and that Federal district, directed the jury that, if they found for the plaintiff, they should also return an alternative verdict for the defendant which could be entered if later it should be held as a matter of law that plaintiff was not entitled to recover. Mass. Gen. Laws, Chap. 231, Section 120; Automatic Pencil Sharpener Co. v. Boston Pencil Pointer Co. (C. C. A. 1st), 279 Fed. 40. The jury gave plaintiff a verdict for $25,000.00 and made the alternative finding as directed. Afterwards, on motion of defendant, the district judge set aside the verdict for plaintiff and entered the alternative verdict. He held that there was no evidence to support a finding against the defendant. * * * The case was taken to the circuit court of appeals, and that court vacated the judgment of the district court, set aside the verdict for defendant, and remanded the case with directions to reinstate the verdict and give judgment for plaintiffs. 3 F. (2) 747. This court granted defendant's petition for a writ of certiorari."

The judgment of the Circuit Court of Appeals was reversed; but the reversal was based on insufficiency of the evidence and not on any disapproval of the procedure indicated above.

4. *The judgment in this cause was in conformity with the plain purpose and intent of the rule involved.*

Manifestly, the purpose of the new Federal Rules of Civil Procedure was to expedite proceedings in the federal courts. Notice was taken of this purpose by the Court of Appeals in this case, the opinion (108 F. (2d) 853) containing this language:

"The new rules are not intended to prolong litigation by permitting litigants to try cases piecemeal. Their purpose would not be accomplished if when relief is asked on condition or in the alternative the successful party could on reversal go back to the trial court and demand a ruling on his conditional or alternative proposition."

Moreover, as we construe the plain wording of Rule 50 (b), the trial court would have had power, even in a proper case, either to grant the motion for a new trial or the motion for judgment notwithstanding the verdict—one or the other—not both; and the granting of either is tantamount to a denial of the other. The applicable portion of the rule is:

"* * * * * A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand, or may reopen the judgment, and either order a new trial or direct the entry of judgment as if the requested verdict had been directed."

Thus, it will be seen that the rule plainly provides that the court may grant either motion; but there is no power given under the rule to grant both. It would seem, therefore, that the Eighth Circuit Court of Appeals put the proper construction on the rule when it said (108 F. (2d) 853):

"The order sustaining the motion for judgment notwithstanding the verdict was equivalent to a denial of the motion for a new trial; and the latter motion passed out of the case upon the entry of the order."

To the same effect are the authorities generally.

5. *The contigency under which petitioner sought a new trial never happened.*

On this point, we content ourselves with the reasoning of the Eighth Circuit Court of Appeals in the opinion in this cause:

> "Strictly speaking the motion did not pray for relief in the 'alternative,' giving the court a choice between two propositions, either of which he might grant in the first instance. The court was asked to rule on the motion for a new trial only in the 'event' he 'refuses to set aside the verdict * * * and judgment * * and refuses to enter judgment herein in favor of the defendant. * * *.' The court having granted the prayer of the motion as made did not err in not ruling on the motion for a new trial. The condition on which the court was asked to grant a new trial did not come into existence."

6. *Petitioner abandoned its motion for a new trial.*

Petitioner not only failed to follow up its motion for a new trial and to secure a ruling thereon, but affirmatively resisted the efforts of respondent to procure such ruling.

While no great stress is placed by respondent on the language of the textwriter on this question, still, the Fifth Circuit Court of Appeals, in the Pruitt case, *supra*, makes reference thereto and seems to place some reliance thereon, and petitioner likewise seems to rely thereon. If, however, the rule as stated by Mr. Simpkins is correct, petitioner had the right in the trial court to have at least an alternative ruling on its motion. It proceeded without procuring such ruling, and in a manner inconsistent with its motion for a new trial; and, by failing to have its motion for a new trial passed upon, and by resisting the move by plaintiff to have that motion decided, it abandoned the motion. There is no dispute about what the record reflects in this connection. Appellant's verified pleading (R. 109, l. 6) shows "that defendant resisted the request of plaintiff to have the grounds of relief specified, and insisted that its motion for a new trial passed out of existence and

consideration on the granting of its motion for a judgment notwithstanding the verdict." There was no denial of this sworn allegation. A motion for new trial, like any other motion or pleading, can be abandoned, and should be considered abandoned where the moving party not only does not attempt to procure a ruling but resists any ruling thereon, and proceeds in a manner inconsistent therewith.

> "It is a general rule, to which there are few exceptions, that he who abandons one point or position, and selects another, must rest his case upon the latter; and, if that be adjudged against him, he will not be allowed to return to the first point, which he has voluntarily relinquished."—*Wilson v. Fowler*, 3 Ark. 463.
>
> "So also, where the moving party, before the determination of the motion, proceeds in the action in a manner inconsistent with the object of the motion, the latter is waived." 42 C. J. 516, Section 173.
>
> "Where no ruling appears to be made upon a motion, the presumption is, unless it otherwise appears, that the motion was waived." 42 C. J. 517, 173; *Cook v. Smith*, 50 Iowa 700; *Morsell v. Hall*, 13 How. 212, 14 L. ed. 117.

Petitioner claims that it is being deprived of a right; that, because the trial court erred in passing on its motions, the decision of the Circuit Court of Appeals deprives it of the right to have a ruling on its motion for a new trial. This complaint is not well founded. There are many instances in which litigants must elect as to the remedy they will pursue and, having elected, they will be—and ought to be—bound by their election. Motions for judgment non obstante veredicto and for a new trial are inconsistent remedies. Petitioner could not have both at the same time. It could elect in the first instance which motion it would pursue. True, it could seek both alternatively; but alternative means one or the other—not both. If the trial court erred, who induced the error? Even according to petitioner's own textbook authority, it had the right to seek an alternative ruling on its motion for a new

trial. Not only did it not seek such ruling, but resisted it when respondent sought it. If petitioner has lost any right, who induced that loss?

7. *The question now presented to this court has become moot insofar as the case at bar is concerned.*

It is the contention of the appellant that, so far as the validity of his judgment is concerned, it is not material how the question presented to this court is answered; that the answer to that question will merely settle a question of procedure that, while it is of general interest and importance, is no longer of any importance in this particular case, all questions and issues going to the merits of the case having been settled adversely to appellee, and the right of further review having been foreclosed.

This Court will consider only the issues presented in the petition for the writ of certiorari.

This assertion seems to be well settled.

Section 2 of Rule 38 of the Rules of the Supreme Court of the United States, in setting out the necessary contents of a petition for a writ of certiorari, and the effect thereof, among other things, provides:

> "The petition shall contain * * * the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

In the case of *Alice State Bank v. Houston Pasture Company*, 247 U. S. 240, 62 L. ed. 1096, this court said:

> "A plausible argument can be made that the working of the Act of 1870 and other pertinent facts and statutes which we do not recite was to give to the land warrant the validity and effect that it would have had if lawfully executed in General Houston's life. But as that is not the ground upon which the writ of certiorari was asked or granted, we confine our discussion to the matter relied upon in asking the

intervention of this court. *Hubbard v. Todd*, 171 U. S. 474, 494, 43 L. ed. 246, 253, 19 Sup. Ct. Rep. 14."

In the case of *Webster Electric Company v. Splitdorf Electric Company*, 264 U. S. 463, 68 L. ed. 792, this court said:

> "This writ brings up for review the decree of the court below in a patent suit (283 Fed. 83), reversing a decree of the Federal district court for the northern district of Illinois (225 Fed. 907), and directing a dismissal of the bill. Three patents were involved. The decision in respect to two of them turned upon the question whether a license contract between the patentees, Henry and Emil Podlesak, and petitioner, had the effect of precluding an assignment of patent rights made by the Podlesaks to respondent. But the petition upon which the writ was granted challenged the decision below only in respect of the third patent; and we are not called upon to consider the contentions now advanced as to the others. Alice State Bank v. Houston Pasture Co., 247 U. S. 240, 242, 62 L. ed. 1096, 38 Sup. Ct. Rep. 496."

In the case of *Davis v. Currie*, 266 U. S. 182, 69 L. ed. 234, this court said:

> "This writ must be dismissed. The petition therefor declared: The sole question is: 'Can damages for humiliation and wounded feelings be awarded for respondent against the petitioner, the United States Railroad Administration, under the provisions of the Federal Control Act, the proclamations of the President, and the general orders of the Director General pursuant thereto?'
>
> "At the hearing counsel relied on the following: 'The judgment against the Director General of Railroads for wounded feelings and humiliation arising out of a wanton, wilful and malicious act of his servant is unauthorized, involving essentially, the infliction of a penalty upon the government.' The argument was that, although the trial court distinctly limited the jury to actual damages, nevertheless, it necessarily follows from the size of the verdict that punitive damages were assessed against, and a penal-

ty imposed upon, the United States.

"The petition did not state the case presented at the bar.

"Dismissed."

In the case of *Erie Railroad Company v. Kirkendall*, 266 U. S. 185, 69 L. ed. 236, this court said:

"The writ must be dismissed. The inducing petition failed to give adequate information concerning the record and essential facts. Furness, W. & Co. v. Yang-Tsze Ins. Asso., 242 U. S. 430, 61 L. ed. 409, 37 Sup. Ct. Rep. 141; Layne & B. Corp. v. Western Well Works, 261 U. S. 387, 67 L. ed. 712, 43 Sup. Ct. Rep. 422; Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U. S. 508, 68 L. Ed. 413, 44 Sup. Ct. Rep. 164. The confused state of the record renders it difficult to ascertain the facts; maybe impossible. The petition for certiorari seemed to represent that, at time of shipment, the consignor accepted a bill of lading misdescribing the contents of the package and accepted a rate based upon limited liability, as he must have known.

"It appears, however, that the shipper correctly reported the contents to the railroad, that he was not asked concerning value and made no representations relative thereto, that no rate was quoted, and that the undisclosed charges were to be collected at destination. The bill of lading contained no statement of value or rate, and no provisions restricting the carrier's liability to less than the actual worth. Section 8 provides: 'The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.' New York C. R. Co. v. Goldberg, 250 U. S. 85, 87, 63 L. ed. 857, 858, 39 Sup. Ct. Rep. 402.

"The case tendered by the petition is radically different from the one presented upon the argument."

In the case of *Independent Wireless Telegraph Co. v. Radio Corporation of America*, 270 U. S. 84, 70 L. ed. 481, this court said:

> "The briefs for the Independent Wireless Company did not raise any question on this point in this court, nor was it mentioned in that company's petition for certiorari. Its whole argument therein was devoted to the issue whether, assuming that the Radio Company was an exclusive licensee, it could make the patentee company, the DeForest Company, a co-complainant. As the district judge remarked in his opinion, the contracts out of which the Radio Company's alleged exclusive license arises are complicated, and this court, in view of the decisions of both the lower courts, holding such exclusive rights in the Radio Company as a licensee to exist, decided the case on the basis of those rights. In view of the course of the Independent Wireless Company in not making this point in its petition for certiorari, briefs or argument, we do not propose to examine this question now raised for the first time. Our writ of certiorari was granted solely because of the importance of the question of patent practice decided in our opinion already announced. However, as the case must now be remanded to the district court for further proceedings, we have no wish by action of ours to preclude the defendant below from making the point unless it is prevented by his course in the courts below."

In the case of *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U. S. 62, 71 L. ed. 534, this court said:

> "Respondents notwithstanding their failure to petition for certiorari, now ask for reversal of that part of the decree which leaves in force part of paragraph (e) and paragraphs (g) and (h). This court has the same power and authority as if the case had been carried here by appeal or writ of error. A party who has not sought review by appeal or writ or error will not be heard in an appellate court to question the correctness of the decree of the lower court. This is so well settled that citation is not necessary. The respondents are not entitled as of right to have that part of the

decree reviewed. Hubbard v. Todd, 171 U. S. 474, 494, 43 L. ed. 246, 253, 19 Sup. Ct. Rep. 14; French Republic v. Saratoga Vichy Spring Co., 191 U. S. 427, 440, 48 L. ed. 247, 253, 24 Sup. Ct. Rep. 145; Alice State Bank v. Houston Pasture Co., 247 U. S. 240, 242, 62 L. ed. 1096, 1098, 38 Sup. Ct. Rep. 496. Cf. Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 257, 60 L. ed. 629, 633, 36 Sup. Ct. Rep. 342."

In the case of *Gunning v. Colley*, 281 U. S. 90, 74 L. ed. 720, this court said:

"Defendant seeks reversal on a number of grounds that were not mentioned in his petition for the writ. But this court is not called on to consider any question not raised by the petition. Webster Electric Co. v. Splitdorf Electric Co., 264 U. S. 463, 464, 68 L. ed. 792, 793, 44 Sup. Ct. Rep. 342."

In the case of *Connecticut Railway & Light Co. v. Palmer*, 305 U. S. 493, 83 L. ed. 309, this court said:

"First. The claim for deficiencies in the property returned to petitioner is not properly before this Court. The petition for certiorari did not include the claim among the questions presented or reasons for the issuance of the writ. It was listed as one of three rulings below. The first related to rent accrued to petition filed, the second to deficiencies in property returned, and the third to damages for rejection of the lease. Nowhere in the petition was there complaint as to the first two items. Clearly the petition sought review solely of the decree in so far as it limited petitioner's claim under Section 77 for damages from rejection of the unexpired lease. As clearly, certiorari was granted to review only the matter which this Court was advised aggrieved petitioner. Johnson v. Manhattan R. Co., 289 U. S. 479, 494, 77 L. ed. 1331, 1343, 53 S. Ct. 721; General Talking Pictures Co. v. Western Electric Co., 304 U. S. 175, 177-179, 82 L. ed. 1273-1275, 58 S. Ct. 849. Petitioner relies upon Washington. V. & M. Coach Co. v. National Labor Relations Bd., 301 U. S. 142, 146, 81 L. ed. 965, 969, 57 S. Ct. 648. Neither the language of that case nor the authorities there cited in support of the refusal to

review a claim not mentioned give vitality to the suggestion of the petitioner that a mere reference in a petition for certiorari to a ruling, without a request for review, will cause its consideration."

The favorable action of the Supreme Court on the petition of appellee would not affect in any manner the right of this petitioner to collect his judgment, for the reasons that the petition for writ of certiorari raises no question that goes to the merits of the judgment; that every question on the merits of the action is now foreclosed to appellee by a final and conclusive judgment; that no contention is made by appellee that the questions going to the merits of the case were wrongfully decided; that the time within which such question could be raised has now expired, and that the only effect of a decision on the question raised in the petition for the writ of certiorari and kept alive in this action would be to settle a purely academic question of general procedure that has become moot as to this particular case.

The only question presented in the petition for the writ of certiorari is whether or not the Circuit Court of Appeals should have directed the re-entry of the original judgment, or should have remanded the cause to the trial court to pass on appellee's motion for a new trial. The most advantageous position in which appellee could be placed would be brought about by the sustaining of its contention that the cause should have been remanded to the trial court for disposition of its motion for a new trial. Let us assume, for the sake of this argument, that this court should so hold, and that the cause should be remanded to the trial court for action on the motion for new trial, and, under that situation, ascertain whether or not the present judgment could be affected in any manner. What could appellee ask the trial court to do?—Reverse the Circuit Court of Appeals? Appellee would be in exactly the same position that a judgment debtor in Arkansas would be in moving the court to vacate and set aside a judgment against him because it was taken without notice. Confessedly it is irregular (the statute says the action is void)

to take a judgment without notice; but the Arkansas courts have uniformly held that the mere showing of want of notice is not sufficient to justify the setting aside of the judgment; and that the judgment debtor must further show that he had a meritorious defense to the action. The law does not require the doing of a vain or futile thing. Appellee has no defense left open to it; hence, it has no right to postpone the collection of appellant's judgment.

Every material question raised by the motion for new trial has been finally determined, and the trial court would be precluded from taking any action on the motion for a new trial further than to overrule it. Of the six defensive issues asserted in the trial court and incorporated in the motion for a new trial, four were expressly and affirmatively abandoned (R. 129) by appellee in the Circuit Court of Appeals. Certainly no new trial could be granted on any of those issues. Of the remaining two issues, both were clearly determined adversely (R. 133) to the contentions of appellee, and no question of the correctness of this determination was raised in the petition for the writ of certiorari, and the time within which such question could have been raised expired on May 20, 1940. No new trial, therefore, could be granted on these issues.

If any question as to the correctness of the decision of the Circuit Court of Appeals on any of the material issues going to the merits of the defense had been kept open, then we might be confronted with an entirely different situation; but that has not been done; and we must deal with the situation that actually exists. If the judgment in favor of this petitioner was correct—and appellee does not contend that it is not correct—then why should petitioner not be prmitted to proceed to enforce its collection? Appellee merely says that a matter of procedure in obtaining a just and correct judgment was irregular.

Even so, the settling of that question would not affect the judgment in any manner.

Petitioner argues that the trial court "positively and unequivocably" found that the verdict in this case was against the preponderance of the evidence. We are un-

able to read any such finding into the trial court's language. The trial court made no finding on the weight or preponderance of the evidence. It is clear that the trial court wholly misconceived the import of the evidence and thought there was no evidence whatever showing negligence, and that it was necessary for plaintiff to show negligence on the part of petitioner in employing Jackson.

It has never been the rule in the federal courts that a new trial would be granted merely because the verdict seems to be against the preponderance of the evidence. *Sampson v. Channell*, 27 Fed. Supp. 213 (D. C., D. Mass.). The Conformity Act (and hence the rule in the State Court) has never applied to the granting of new trials in the federal courts. *Chicago Life Ins. Co. v. Tiernan*, 263 Fed. 330 (C. C. A. 8). And, furthermore, under the provisions of Section 269 of the Judicial Code (Section 391, Title 28, U. S. C. A.), the appellate court should have rendered judgment on the whole record, without regard to technical errors not affecting the substantial rights of the parties.

The practice of moving for a judgment notwithstanding the verdict was a practice unknown to federal procedure prior to the adoption of the Federal Rules of Civil Procedure. *Glynn v. Krippner*, 60 Fed. (2d) 406, 409 (C. C. A. 8); *Greer Construction Co. v. C. R. I. & P. Ry. C.*, 65 Fed. (2d) 852, 853 (C.C.A.8); *H. F. Wilcox Oil & Gas Co. v. Skidmore*, 72 F. (2d) 748, 753 (C. C. A. 8); *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, 57 L. ed. 879. The practice now does not, in fact, recognize a motion for judgment notwithstanding the verdict, but the procedure is, in reality, the renewal of a motion for a directed verdict and leads to the same results as would a motion for directed verdict. *Valanda v. Baum & Reissman*, 31 Fed. Supp. 71.

Prior to the adoption of the new Federal Rules of Civil Procedure, the practice in respect to the form of judgment to be entered in the appellate court was governed by the procedure in the trial court. If the questions of law raised by the motion for a directed verdict were reserved,

the appellate court, if it reversed, directed the entry of the judgment that should have been entered by the trial court; and, if they were not reserved, the cause was remanded for a new trial. *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 57 L. ed. 879; *Baltimore & Carolina Line v. Redman*, 285 U. S. 654, 79 L. ed. 1936; *Aetna Insurance Co. v. Kennedy*, 301 U. S. 389, 81 L. ed. 1177; *Carpenter v. Durrell*, 90 Fed. (2d) 57, 60 (C. C. A. 6), 302 U. S. 721, 82 L. ed. 557. This distinction was abolished by rule 50 (b) of the Rules of Civil Procedure, wherein it is provided that the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Under the procedure established by this rule, the appellate court will direct the entry of the judgment that should have been entered by the trial court.

The real purpose of the rule in question was to harmonize and definitely settle the procedure discussed in the Slocum, Redman and Kennedy cases, supra, and to submit the cases with all questions of law reserved, so as to prevent the very delay which petitioner here seeks to invoke.

It is respectfully submitted, therefore, that the judgment of the Circuit Court of Appeals in this cause was correct on its merits; that, in any event, petitioner waived any right it might have had to have a ruling on its motion for a new trial and that the question presented in this cause has now become moot.

KENNETH W. COULTER,
BOONE T. COULTER,
EDWARD H. COULTER,

Little Rock, Arkansas,

For Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1940.

Montgomery Ward and Company, vs. Luther M. Duncan.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 9, 1940.]

Mr. Justice Roberts delivered the opinion of the Court.

In this case we are called upon to determine the appropriate procedure under Rule 50(b) of the Federal Rules of Civil Procedure.[1]

To recover damages for personal injuries, respondent (hereinafter spoken of as plaintiff) brought action against petitioner (hereinafter spoken of as defendant), pursuant to an Arkansas statute declaring that corporations should be liable for injuries to an employe attributable to the negligence of a fellow employe. The complaint alleged that the plaintiff, while in the defendant's service, had been so injured. The answer denied the plaintiff was an employe of the defendant; denied he was injured in the manner described or by the negligence of his co-employe, and set up assumption of risk. At the close of the evidence upon the trial, the defendant moved for a directed verdict. The motion was denied and the jury returned a verdict for plaintiff on which judgment was entered. Within ten days the defendant filed its written motion in the following form:

[1] 308 U. S. Appendix, p. 63; U. S. C. A. Tit. 28, § 723 c addendum. "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

"Comes the defendant, Montgomery Ward & Company, and files its motion praying that the jury's verdict herein and the judgment rendered and entered thereon be set aside and judgment entered herein for the defendant notwithstanding the verdict, and its motion for a new trial in the alternative, and as grounds therefor states:"

Thereunder, in heading A, it set out nine reasons in support of the motion for judgment, four of which were general, to the effect that the verdict was contrary to law, to the evidence, to the law and the evidence, and that the court erred in refusing to direct a verdict. Four challenged the sufficiency of the evidence as to negligence, as to the existence of the employment relation, and as to assumption of risk, to support the verdict. One dealt with the preponderance of the evidence and was therefore inappropriate in support of the motion.

Under heading B, in support of the motion for a new trial, the same reasons as were assigned for the other motion were, with an immaterial exception, repeated; and additional reasons were added to the effect that the damages were excessive; that the court erred in ruling upon evidence, and in refusing to give requested instructions.

The motion concluded thus:

"Wherefore, the defendant prays that the verdict of the jury herein, and the judgment rendered and entered thereon, be set aside, and a judgment rendered and entered herein in favor of the defendant; and defendant further prays in the alternative that in the event the Court refuses to set aside the verdict rendered for the plaintiff and the judgment in favor of the plaintiff rendered and entered on said verdict, and refuses to render and enter judgment herein in favor of the defendant notwithstanding said verdict and judgment, that the court set aside said verdict and judgment on behalf of the plaintiff and grant the defendant a new trial herein."

The District Court rendered an opinion[2] holding that there was no evidence of negligence on the part of the co-employe and that, therefore, judgment should be entered for the defendant.

The plaintiff filed a motion praying that, to limit the issues on appeal, the court's order and judgment specifically show the grounds on which relief was granted, and "in order that the judgment of the appellate court may be final", the motion for a new trial be

[2] 27 F. Supp. 4.

overruled. The court, however, merely entered a judgment for the defendant notwithstanding the verdict.

The plaintiff filed a second motion reciting that, at a hearing upon his earlier motion, the defendant had resisted the contention that the court should rule on the motion for a new trial as that motion "passed out of existence and consideration on the granting of its motion for a judgment notwithstanding the verdict." The plaintiff further recited that the court did not pass upon the plaintiff's contentions but simply entered a judgment in favor of the defendant, and renewed his prayer that the court consider the motion, modify the judgment to specify the grounds upon which relief was granted, and dispose of all issues raised by both motions. This was denied.

The plaintiff appealed to the Circuit Court of Appeals, which decided that the District Court erred in holding the evidence insufficient to make a case for a jury. It reversed the judgment and remanded the cause with instructions to the District Court to enter judgment on the verdict in favor of the plaintiff.[3] It overruled the defendant's contention that the case should be remanded with leave to the trial court to dispose of the motion for a new trial.

The importance of a decision by this court, respecting the proper practice under Rule 50(b), and a conflict of decisions,[4] moved us to grant certiorari.

The Circuit Court of Appeals said:

"Strictly speaking the motion did not pray for relief in the 'alternative', giving the court a choice between two propositions either of which he might grant in the first instance. The court was asked to rule on the motion for a new trial only 'in the event' he 'refuses to set aside the verdict . . . and judgment . . . and refuses to enter judgment herein in favor of the defendant . . . .' The court having granted the prayer of the motion as made did not err in not ruling on the motion for a new trial. The condition on which the court was asked to grant a new trial did not come into existence. The new rules are not intended to prolong litigation by

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[3] 108 F. (2d) 848.

[4] Pruitt *v.* Hardware Dealers Mutual Fire Ins. Co., 112 F. (2d) 140; Pessagno *v.* Euclid Investment Co., Inc., 112 F. (2d) 577. Other cases cited seem not to have raised the precise question here presented. Leader *v.* Apex Hosiery Co., 108 F. (2d) 71; affirmed 310 U. S. 469; Mass. Protective Assn. *v.* Mouber, 110 F. (2d) 203; Lowden *v.* Denton, 110 F. (2d) 274; Reliance Life Ins. Co. *v.* Burgess, 112 F. (2d) 234; Ferro Concrete Construction Co. *v.* United States, 112 F. (2d) 488; Williams *v.* New Jersey-New York Transit Co., 113 F. (2d) 649; Southern Ry Co. *v.* Bell, 114 F. (2d) 341.

permitting litigants to try cases piecemeal. Their purpose would not be accomplished if when relief is asked on condition or in the alternative the successful party could on reversal go back to the trial court and demand a ruling on his conditional or alternative proposition. The order sustaining the motion for judgment notwithstanding the verdict was equivalent to a denial of the motion for a new trial; and the latter motion passed out of the case upon the entry of the order."

The defendant contends that the rule continues the existing practice respecting granting of new trials, and also regulates the procedure for rendering judgment notwithstanding a verdict; that the provision for an alternative motion for a new trial would be meaningless and nugatory if the granting of the motion for judgment operated automatically to dismiss it, since the bases of the two motions are, or may be, different, and orderly procedure requires that the court first rule on the motion for judgment, the granting of which renders unnecessary a ruling upon the notion for a new trial, which should be reserved until final disposition of the former.

The plaintiff insists that the trial court is limited to a choice of action on one motion or the other, but cannot rule upon the motion for judgment and leave that for a new trial to be disposed of only if judgment notwithstanding the verdict is denied. He further asserts, in support of the judgment below, that the uncontradicted allegations of his motion in the District Court disclose that defendant elected to stand upon its motion for judgment alone and that it cannot now repudiate the position thus taken.

We shall consider the plaintiff's contentions in inverse order.

1. While we took the case to review the Circuit Court's construction of the rule, it is true that if the defendant elected to stand on its motion for judgment and, in effect, withdrew its motion for a new trial, we do not reach the question involved in our grant of certiorari. We are, however, unable to spell out any such election or withdrawal. The motion for a new trial assigned grounds not appropriate to be considered in connection with the motion for judgment. It put forward claims that the verdict was against the weight of the evidence and was excessive; that the court erred in rulings on evidence and in refusing requested instructions. An affirmative finding with respect to any of these claims would have

required a new trial whereas none of them could be considered in connection with the motion for judgment.

We think that when the defendant urged upon the District Court that it should not decide the motion for a new trial because it passed out of existence and consideration on the granting of the motion for judgment, all that defendant meant was that, having granted the motion for judgment, the court had no occasion to pass upon the reasons assigned in support of the motion for a new trial. That would obviously have been true if no appeal had been taken from the District Court's action or if that action had been affirmed upon appeal.

2. We come then to the substantial question which moved us to issue the writ, namely, whether under Rule 50(b) the District Court's grant of the motion for judgment effected an automatic denial of the alternative motion for a new trial. We hold that it did not.

The rule was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It does not alter the right of either party to have a question of law reserved upon the decision of which the court might enter judgment for one party in spite of a verdict in favor of the other.[5] Prior to the adoption of the rule, in order to accomplish this it was necessary for the court to reserve the question of law raised by a motion to direct a verdict.[6] The practice was an incident of jury trial at common law at the time of the adoption of the Seventh Amendment to the Constitution.[7]

Rule 50(b) merely renders unnecessary a request for reservation of the question of law or a formal reservation and, in addition, regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct It adds nothing of substance to rights of litigants heretofore existing and available through a more cumbersome procedure.

A motion for judgment notwithstanding the verdict did not, at common law, preclude a motion for a new trial.[8] And the latter

[5] Compare Slocum *v.* New York Life Ins. Co., 228 U. S. 364 with Baltimore and C. Line *v.* Redman, 295 U. S. 654.

[6] Baltimore and C. Line *v.* Redman, *supra*, 659.

[7] *Ibid.*, 660.

[8] Thompson, Trials, (2d) Ed. § 2726; Brannon *v.* May, 42 Ind. 92; Stone *v.* Hawkeye Ins. Co., 68 Iowa 737; Tomberlin *v.* Chicago etc. Ry. Co., 211 Wis. 144, 148.

motion might be, and often was, presented after the former had been denied. The rule was not intended to alter the existing right to move for a new trial theretofore recognized and confirmed by statute.[9] It permits the filing of a motion for judgment in the absence of a motion for a new trial or the filing of both motions jointly or a motion for a new trial in the alternative.

Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.

We are opinion that the provision of the rule,—"A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative"—does not confine the trial judge to an initial choice of disposing of either motion, the exercise of which choice precludes consideration of the remaining motion. We hold that the phrase "in the alternative" means that the things to which it refers are to be taken not together but one in the place of the other.[10]

The rule contemplates that either party to the action is entitled to the trial judge's decision on both motions, if both are presented. A decision in favor of the moving party upon the motion for judgment ends the litigation and often makes it possible for an appellate court to dispose of the case without remanding it for a new trial. If, however, as in the present instance, the trial court erred in granting the motion the party against whom the verdict went is entitled to have his motion for a new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge. In this case the reasons assigned in support of the motion for a new trial were in both categories. The grounds assigned for a new trial have not been considered by the court. In the circum-

[9] See Rule 59(a) U. S. C. A. 723(c) addendum; cf: Judicial Code § 269, as amended, 28 U. S. C. § 391.

[10] The word "alternative" may be used properly in this sense. See Webster's International Dictionary, Second Edition.

stances here disclosed the uniform practice in state appellate courts has been to remand the case to the trial court with leave to pass upon the motion for new trial.[11]

The plaintiff urges that, whereas the rule was intended to expedite litigation, to prevent unnecessary trials, and to save the time of courts and litigants, the course urged by the defendant tends to extend the duration of litigation, to create unnecessary hardship, and to defeat the purpose of the rule.

We are of opinion that the position is untenable. This case well illustrates the efficacy of the procedure sanctioned by the rule. In view of the trial judge's conclusion that the plaintiff failed to make out a case for the jury he would, under the earlier practice, simply have granted a new trial Upon the new trial, the judge, if his view as to the law remained unchanged, would have directed a verdict for the defendant. The only recourse of the plaintiff would have been an appeal from this second judgment. If the appellate court had been of the view it here expressed, it would have reversed that judgment and remanded the cause for a third trial. Upon such third trial, if the trial court had ruled upon the evidence and given the instructions to which the defendant objects a judgment for the plaintiff would have been the subject of a third appeal and, if the defendant's position were sustained by the appellate court, the cause would be remanded for a fourth trial at which proper rulings would be rendered and proper instructions given.

Much of the delay formerly encountered may be avoided by pursuing the course for which the defendant contends. But the courts should so administer the rule as to accomplish all that is permissible under its terms. Is it necessary, if the trial judge's order for judgment be reversed on appeal, that only thereafter he deal with the al-

[11] Bryan *v.* Inspiration Consol. Copper Co., 24 Ariz. 47; Estate of Caldwell, 216 Cal. 694; Hayden *v.* Johnson, 59 Ga. 104; Chicago & N. W. Ry. Co. *v.* Dimick, 96 Ill. 42; Daniels *v.* Butler, 175 Ia. 439; Linker *v.* Union Pac. R. Co., 87 Kan 186; Cummins' Estate, 271 Mich. 215; Kies *v.* Searles, 146 Minn. 359; Central Metropolitan Bank *v.* Fidelity & Casualty Co., 159 Minn. 28; Wegmann *v.* Minneapolis St. Ry. Co., 165 Minn. 41; Trovatten *v.* Hanson, 171 Minn. 130; Fisk *v.* Henarie, 15 Or. 89; Osche *v.* New York L. I. Co., 324 Pa. 1; Altomari *v.* Kruger, 325 Pa. 235; Raske *v.* Northern Pac. Ry. Co., 74 Wash. 155; McLain *v.* Easley, 146 Wash. 377. Statutory provisions or rules render it possible in some states to bring the grounds for new trial or the action of the trial court on the motion for new trial before the appellate court. See Peters *v.* Aetna L. I. Co., 282 Mich. 426; Kanders *v.* Equitable L. I. Co., 299 Ill. App. 152; Dochtermann Van & Express Co. *v.* Fiss, 155 App. Div. (N. Y.) 162.

ternative motion? If so, and he then refuses to set aside the original judgment, a second appeal will lie,—not from his order denying a new trial, for that order, save in most exceptional circumstances, is not appealable,[12] but from the judgment entered on the verdict, for errors of law committed on the trial. Can such a second appeal be avoided in the interest of speeding litigation? We think so.

If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon he should also rule on the motion for a new trial, indicating the grounds of his decision. If he denies a judgment *n. o. v.* and also denies a new trial the judgment on the verdict stands; and the losing party may appeal from the judgment entered upon it, assigning as error both the refusal of judgment *n. o. v.* and errors of law in the trial, as heretofore.[13] The appellate court may reverse the former action and itself enter judgment *n. o. v.* or it may reverse and remand for a new trial for errors of law. If the trial judge, as he did here, grants judgment *n. o. v.* and denies the motion for a new trial, the party who obtained the verdict may, as he did here, appeal from that judgment. Essentially, since his action is subject to review, the trial judge's order is an order *nisi*. The judgment on the verdict may still stand, because the appellate court may reverse the trial judge's action. This being so, we see no reason why the appellee may not, and should not, cross-assign error, in the appellant's appeal, to rulings of law at the trial, so that if the appellate court reverses the order for judgment *n. o. v.*, it may pass on the errors of law which the appellee asserts nullify the judgment on the verdict.[14]

Should the trial judge enter judgment *n. o. v.* and, in the alternative, grant a new trial on any of the grounds assigned therefor, his disposition of the motion for a new trial would not ordinarily be reviewable,[15] and only his action in entering judgment would be ground of appeal. If the judgment were reversed, the case, on

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[12] See Fairmount Glass Works *v.* Cub Fork Coal Co., 287 U. S. 474, 481-485.

[13] Hall *v.* Weare, 92 U. S. 728, 732.

[14] This procedure is prescribed under a statute and a supplementary court rule in Michigan; Peters *v.* Aetna Life Ins. Co., 282 Mich. 426, and perhaps is indicated in Wisconsin in the absence of statute or formal rule: Tomberlin *v.* Chicago St. P. M. & O. R. Co., 211 Wis. 144, 149.

[15] United States *v.* Young, 94 U. S. 258; Young *v.* United States, 95 U. S. 641; Phillips *v.* Negley, 117 U. S. 665, 671; Hume *v.* Bowie, 148 U. S. 245; Fairmount Glass Works *v.* Cub Fork Coal Co., *supra*.

remand, would be governed by the trial judge's award of a new trial.

We might reverse and direct that the cause be remanded to the District Court to pass on both motions. But that course would, in the circumstances, be neither fair nor practical. As respects federal courts, the procedure permitted by the rule is novel. The provision which is involved in this case substantially follows the first state statute to authorize such procedure.[16] The Supreme Court of that State has construed the statute to permit the trial judge to pass on the motion for judgment, leaving the motion for a new trial for later disposition. In the event that his decision is reversed, the practice is to remand the cause with leave to the trial judge to pass upon the motion for a new trial.[17] It was therefore not unnatural for the defendant to advocate that course, or for the trial judge to follow it.

In the circumstances, we think the failure of the District Court to rule in the alternative on both matters can be cured without depriving the defendant of opportunity to have its motion for a new trial heard and decided by the trial court, by modifying the judgment below to provide that the cause be remanded to the District Court to hear and rule upon that motion.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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16 2 Mason's Minnesota Statutes (1927) §9495.

17 See the Minnesota cases cited in note 11.